89-1001

No.

In the Supreme Court of the United States

October Term, 1989

SWIN RESOURCE SYSTEMS, INC.,

Petitioner

vs.

LYCOMING COUNTY, PENNSYLVANIA, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

KIRKPATRICK & LOCKHART
JOHN P. KRILL, JR.*
CARLETON O. STROUSS
ANDREW H. CLINE
Attorneys for Petitioner
The Payne Shoemaker Building
240 North Third Street
Harrisburg, PA 17101-1503
(717) 231-4500
**Counsel of Record*

RICHARD A. GAHR*
428 Market Street
Suite 310
Williamsport, PA 17701
(717) 323-9177
**Of Counsel*

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does the market participant exception to the dormant Commerce Clause permit a state to acquire a scarce natural resource, *i.e.* landfill space, and to hoard it for the preferred use of its own residents?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the petitioner, Swin Resource Systems, Inc., and the respondents, Lycoming County, Pennsylvania, acting through the Lycoming County Solid Waste Department; Dolly M. Wilt, Gene Smith, and Lori Morningstar, all in their respective official capacities as Commissioners of Lycoming County, Pennsylvania and each in his or her individual capacity; and Wayne I. Alexander, in his official capacity as General Manager of Solid Waste Facilities of the Lycoming County Solid Waste Department and in his individual capacity.

Swin Resource Systems, Inc., has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES:

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Swin Resource Systems, Inc. ("Swin"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-captioned proceedings on August 25, 1989.

OPINIONS BELOW

The memorandum decision of the United States District Court for the Middle District of Pennsylvania (Conaboy, J.) is reported at 678 F. Supp. 1116 (M.D. Pa. 1988), and is reprinted in the appendix hereto at page 1a, *infra*.

The opinion and order of the District Court denying petitioner's motion to alter or amend judgment has not been reported. It is reproduced in the appendix hereto at page 10a, *infra*.

The opinion of the Court of Appeals for the Third Circuit is reported at 883 F.2d 245 (3d Cir. 1989), and is reprinted in the appendix hereto at page 18a, *infra*.

The order of the Court of Appeals denying rehearing is reprinted in the appendix hereto at page 56a, *infra*.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1343 (civil rights), petitioner brought this suit in the Middle District of Pennsylvania. On February 10, 1988, the district court dismissed petitioner's complaint for failure to establish federal jurisdiction, holding that, *inter alia,* Swin had failed to state a claim under the Commerce Clause. On May 26, 1988, the district court denied petitioner's motion to alter or amend judgment.

On appeal pursuant to 28 U.S.C. §1291, the Third Circuit entered a judgment and order on August 25, 1989, affirming the decision of the district court. On September 25, 1989, the court denied Swin's petition for rehearing.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 8 of the Constitution of the United States:

The Congress shall have the Power

. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . .

STATEMENT OF THE CASE

The Parties

Petitioner is a Pennsylvania corporation with its principal place of business at Bloomsburg, Columbia County, Pennsylvania. Respondents herein are the County of Lycoming, Pennsylvania, its Commissioners, and the General Manager of Solid Waste Facilities for Lycoming County. Except for Lycoming County, the respondents are named in both their official and individual capacities.

History of the Landfill

Since approximately 1978, Lycoming County has operated a sanitary landfill known as the Lycoming County Landfill ("the Landfill") on lands of the United States located at the Federal Prison Camp Reservation, Allenwood, Lycoming County. The County occupies the premises pursuant to a 30-year use and occupancy permit issued in 1973 by the United States Department of Justice, Bureau of Prisons. This permit was issued in accordance with power vested in the Bureau of Prisons by 43 U.S.C. §931(c), which provides that lands leased from federal departments or agencies must be used for "public buildings or other public works." The development of the Landfill was funded, in part, by a federal grant from the Appalachian Regional Commission.

Under the use and occupancy permit, the County obtained an interest in the subject land tantamount to fee ownership. The County is entitled to exclusive exploitation of the property's value as a landfill, and as the property is used for landfill, its capacity for such purpose is progressively diminished until it is exhausted. Thus, the use and occupancy permit should be distinguished from the regulatory permit issued by

the Commonwealth of Pennsylvania for the operation of landfills.[1] The latter permit is issued to confirm that the site meets, among other things, the geological characteristics that make appropriate landfill sites relatively scarce. The use and occupancy permit is essentially the ownership right to exploit this scarce resource.

Significantly, the Landfill was developed pursuant to a County solid waste management plan that called for, *inter alia*, the construction of the Landfill as the only municipal waste disposal site permitted by the plan.[2] In order to ensure the financial success of the Landfill, the County developed a model ordinance to be used by municipalities to designate the Landfill as their municipal waste disposal site. The ordinance also transferred to the County the authority to issue transporter hauling licenses, through the issuance of which the County designates the haulers' disposal site. To further implement the plan, the County entered into contracts with more than 100 municipalities, under which the municipalities, acting pursuant to the regulatory authority of the Pennsylvania Solid Waste Management Act,[3] adopted the County solid waste plan and designated the Landfill for disposal of their waste. The Landfill site has adequate capacity for the next nine to ten years.[4]

---

[1] *See* footnote 4 *infra*.

[2] The facts in this paragraph are based on the deposition of Jerry Walls, Executive Director of the Lycoming County Planning Commission. The basis for the use of his deposition in the district court is discussed in the circuit court's opinion at page 21a, *infra*. All other facts were pleaded in Swin's complaint and must be accepted as true for the purpose of these proceedings. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

[3] Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. §6018.101 et seq.

[4] The Landfill undoubtedly enjoys substantial disposal capacity. In October of 1986, the Pennsylvania Department of Environmental Resources approved a revision to the Lycoming County solid waste management plan which states at page

Swin's Operations

Swin owns and operates a municipal solid waste processing facility in Columbia County, Pennsylvania. Swin operates the facility pursuant to a permit issued by the Commonwealth of Pennsylvania upon a representation, required by the Commonwealth (and agreed to by the County), that the solid waste from the facility would be deposited in the Landfill.

The Swin facility receives municipal solid waste from New Jersey and Eastern Pennsylvania. It separates tires, wooden pallets, appliances, and cardboard from other solid waste. The items that have been separated out are sold to businesses in Pennsylvania and other states that have a commercial need for them. The solid waste that is not recycled is compacted into 40-inch by 30-inch by 60-inch bales in preparation for shipment to the Landfill. The facility produces 300 tons of baled waste per day.

Pursuant to negotiations for a long-term agreement with Swin, the County Solid Waste Department notified Swin by letter in March of 1986 that it would "accept baled waste from your [Swin's] proposed plant in Bloomsburg, Pennsylvania, at a price range of $10.00 per ton." The letter further indicated that the County charged different rates for waste generated within a 5-1/2 county surrounding area and waste originating outside said area, though the price for disposal of waste outside of the 5-1/2 county area was not grossly different from the "within" rate. The County, while not explicitly addressing the issue in the March 6 letter, regarded the baled waste at Swin's facility in Columbia County as waste from within the 5-1/2

55, "[T]he Lycoming County Landfill does have the disposal capacity for an expanded municipal and industrial waste service area well in excess of the required ten-year planning period established by the Pennsylvania Solid Waste Management Act."

county area, an inference supported by the County's acceptance of Swin's baled waste at the reduced rate.

The Dispute

In January of 1987, the County began to charge Swin the higher rate for waste originating outside the 5-1/2 county area, and in March of 1987, the County informed Swin that rather than having unlimited access to the Landfill, Swin would be restricted, permanently, to delivering not more than 100 tons per day to the Landfill. Because alternative disposal sites were scarce and distant, Swin was required to curtail its operations substantially. Subsequently, the County imposed a new rate structure, effective September of 1987, pursuant to which a rate of $30 per ton applied to waste from outside the 5-1/2 county area. Because of the discriminatory price scheme and volume limitations imposed upon it by the respondents, Swin was forced to cease use of the Landfill.

Procedural History

On November 23, 1987, Swin commenced the instant suit in the district court invoking jurisdiction under 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1343 (civil rights). The complaint alleged, *inter alia*, that the pricing scheme and volume limitations established by the County violated the Commerce Clause of the United States Constitution by impermissibly discriminating against interstate commerce.

On February 10, 1988, the district court granted respondents' motion to dismiss, ruling that there was no basis for federal jurisdiction. In its memorandum opinion, the district court disposed of the Commerce Clause issue by reference to decisions of this Court that recognize a "market participant" exception to the Commerce Clause. The court concluded that the actions of the County were those of a

market participant rather than a regulator and, accordingly, not subject to the restrictions of the Commerce Clause. On May 26, 1988, the district court denied petitioner's motion to alter or amend judgment, and on June 14, 1988, petitioner filed a timely notice of appeal, invoking appellate jurisdiction under 28 U.S.C. §1291 (final decisions of district courts).

Argument on appeal was heard by a three-judge panel of the Third Circuit, which affirmed the district court on August 25, 1989, over the dissent of Chief Judge Gibbons. The majority opinion acknowledged that the distinction between market participant and market regulator is not settled and that this Court has expressly reserved the question whether the market participant doctrine applies to state operation of a landfill. (Page 26a, *infra.*) Nevertheless, the majority concluded that the decisions of this Court lead to the conclusion that the County is a mere market participant because its actions "do not pertain to the operation of private landfills and do not apply beyond the immediate market in which Lycoming transacts business." (Page 28a, *infra.*) The majority also rejected Swin's argument that the market participant doctrine does not apply to the state hoarding of scarce natural resources. While the majority acknowledged this Court's "concern that a state's endowment with a natural resource is a product of happenstance rather than hard work," it found that landfills were not natural resources and, thus, that this Court's expressed concerns were not implicated. (Page 32a, *infra.*)

The dissent, written by Chief Judge Gibbons, characterized the majority decision as a misapplication of this Court's decisions. After reviewing this Court's opinions on the market participant doctrine, the dissent concluded that there was "no principled way to distinguish this case" from this Court's decision in *South-Central Timber Development, Inc. v.*

Wunnicke, 467 U.S. 82 (1984), in which application of the market participant doctrine was rejected because, *inter alia*, of the presence of a natural resource.

On September 8, 1989, petitioner filed a timely petition for rehearing *en banc*, arguing that the majority's opinion was contrary to the decisions of this Court and that the appeal involved a question of exceptional public importance. The circuit court denied the petition on September 25, 1989.

REASONS FOR GRANTING THE WRIT

I.

The Third Circuit's Conclusion That Landfills Are Not Natural Resources Is Inconsistent With The Decisions Of This Court

---

There can be no dispute that a fundamental purpose of the Commerce Clause was the development and protection of a national market in goods and services. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949). Its inclusion in the Constitution "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). That those tendencies toward economic Balkanization have persisted to the present is apparent upon a review of this Court's many decisions on the Commerce Clause. States and their subdivisions, ever subject to parochial political pressures, are constantly devising new schemes designed to advance the economic interests of their constituents at the expense of nonresidents.[5] *See, e.g., American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266 (1987) (Pennsylvania motor carrier tax discriminating against out-of-state carriers).

One fertile area for the expression of such protectionist sentiments has been the conservation and exploitation of

---

[5] For the purposes of Commerce Clause analysis, a political subdivision of a state, such as a county, is the equivalent of the state. *See White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983).

natural resources. Perceiving the obvious advantage of restricting their bounty to their residents, states have not infrequently imposed measures designed to promote local development of, or to discourage nonresident consumption of, natural resources that, by happenstance, are located within their borders. Predictably, these protectionist schemes have not withstood scrutiny under the Commerce Clause. *See, e.g., New England Power Co. v. New Hampshire,* 455 U.S. 331 (1982); *Hughes v. Oklahoma, supra; Pennsylvania v. West Virginia,* 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.,* 221 U.S. 229 (1911).

A modern twist to the age-old problem of resource protectionism was presented in *Philadelphia v. New Jersey,* 437 U.S. 617 (1978). There, the Court had occasion to apply Commerce Clause principles to a legislative scheme that drastically limited the disposal of out-of-state trash in New Jersey landfills. Appropriate landfill sites in New Jersey were being exhausted rapidly, and the legislation was apparently designed to extend the useful life of New Jersey's sites for its citizens. Philadelphia, which used New Jersey landfills, sued, claiming the restrictions violated the Commerce Clause. This Court had little difficulty in recognizing that trash was a legitimate article of interstate commerce and that New Jersey's restrictions were an attempt to isolate it from the national economy. Significantly, the Court also recognized that landfill sites are a type of natural resource:

> Also relevant here are the Court's decisions holding that a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders.

Id. at 627. Consistent with its previous Commerce Clause decisions on natural resources, the Court declared New Jersey's scheme unconstitutional.

Subsequently, in *Reeves, Inc. v. Stake,* 447 U.S. 429 (1980), the Court distinguished commodities produced by a state from natural resources found within a state, citing *Philadelphia. Id.* at 443. Thus, there is little room for doubt that this Court has concluded, quite logically, that landfill sites are a type of natural resource.[6] In the instant matter, however, the Third Circuit concluded otherwise.[7] The Third Circuit's refusal to follow this Court's decisions on this issue is clear error with, as explained *infra,* grave implications.

---

[6] Some commentators have also come to the conclusion that landfills are natural resources. *See, e.g.,* Kovacs and Anderson, *States as Market Participants in Solid Waste Disposal Services—Fair Competition or the Destruction of the Private Sector?,* 18 Envtl. L. 779, 810 (1988) [hereinafter "Kovacs and Anderson"].

[7] The Third Circuit majority first reasoned that a landfill cannot be a natural resource because it requires the expenditure of money for preparations and, therefore, is not simply happenstance. (Page 33a, *infra.*) The flaw in this reasoning is that most, if not all, natural resources require the expenditure of funds in order to be developed, yet their location, like land geologically suitable for a landfill, is still a result of happenstance. Next, the majority relied upon the proposition that local benefits should follow local burdens. (Page 34a, *infra.*) This reasoning also falls short, however, because the subject landfill is not just a local burden. Indeed, the landfill is situated on federal property and was financed by a federal grant; presumably both the property and the grant were tax burdens to federal taxpayers, like Swin, outside Lycoming County. Finally, the majority found the characterization of landfills as a natural resource problematic because political factors contribute to the shortage of sites available for landfill use. (Page 35a, *infra.*) Again, however, this point does not distinguish landfills because similar political factors figure in the development of most, if not all, natural resources. The reality that political concerns may make exploitable natural resources scarcer does not alter this Court's core concern with the state hoarding of resources whose geographical distribution is the result of happenstance.

II.

The Third Circuit's Decision Applying The Market Participant Doctrine To The Governmental Hoarding Of Natural Resources Has Resolved An Issue Expressly Reserved By This Court And Has Done So In A Manner Inconsistent With Decisions Of This Court Suggesting Its View

---

The Commerce Clause issue in the *Philadelphia* case concerned a statutory scheme that barred out-of-state trash from private landfills. While the Court in *Philadelphia* determined that trash was a legitimate article of interstate commerce and that landfill sites were a type of natural resource, it expressly reserved the question of a state's "power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources." *Philadelphia v. New Jersey*, 437 U.S. 617, 629 n.6. Subsequent cases have clearly suggested that the hoarding of state-owned natural resources, such as landfills, is not exempt from the reach of the Commerce Clause, but the instant controversy squarely presents the issue. The Circuit Court resolved the issue by applying the "market participant" doctrine to exempt a state-owned landfill from the Commerce Clause. A review of this Court's cases on the market participant doctrine, provides no support for this result and, in fact, suggests a contrary approach.

In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the Court first articulated an exception to the Commerce Clause where a state was acting as a market participant. There, Maryland had entered the market of automobile recycling by offering a premium to Maryland operators that processed junked cars. Characterizing Maryland's actions as participating in a market, rather than regulating a market, the

Court refused to invalidate the program because it found no conflict with "the purposes animating the Commerce Clause." *Id.* at 810. *Alexandria Scrap* did not involve an attempt by a state to restrict its resources to its own residents.

Later, in *Reeves, Inc. v. Stake, supra,* the Court again applied the market participant doctrine but distinguished cases involving natural resources. There, South Dakota operated a cement plant and had generally traded freely with both residents and non-residents. In a time of scarcity, however, South Dakota decided to restrict sales to satisfy the needs of its residents first. The Court rejected a Commerce Clause challenge from a non-resident contractor, which argued that if a state were permitted to hoard its resources, other states would follow, and embargoes halting interstate commerce would result:

> This argument, although rooted in the core purpose of the Commerce Clause, does not fit the present facts. Cement is not a natural resource, like coal, timber, wild game, or minerals. *Cf. Hughes v. Oklahoma,* 441 U.S. 322 (1979) (minnows); *Philadelphia v. New Jersey, supra* (landfill sites) ...

447 U.S. at 443. Thus, the Court implicitly recognized the difficulty of permitting states, consistent with the Commerce Clause, to restrict access to state-owned natural resources to their residents.[8]

White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983), involved the application of the Commerce Clause to a mayor's order that required at least 50

---

[8] The Court also observed that "[w]hatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there, those limits do not apply here." *Id.* at 444.

percent of the work force on city-aided projects be city residents. The Court concluded that the city's action was exempt from the Commerce Clause under the market participant doctrine because workers on city-aided projects were essentially employed by the city. Again, this case did not involve natural resources.

The market participant doctrine was again at issue in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). There, Alaska had imposed conditions on the sale of state-owned timber that restricted interstate commerce. The Court refused to exempt Alaska's scheme under the market participant doctrine, noting, among other things, the involvement in the case of a natural resource.[9]

Most recently, in *New Energy Company v. Limbach*, 486 U.S. 269 (1988), the Court refused to apply the market participant doctrine to a scheme that provided tax credits for ethanol produced in Ohio, or in other states on a reciprocal basis. The assessment of taxes, the Court noted, is a "primeval governmental activity" not analogous to the actions of a private market participant. *Id.*, No. 87-654, slip op. at 7 (May 31, (1988).[10]

---

[9] In *Hicklin v. Orbeck*, 437 U.S. 518 (1978), the Court considered a challenge under the Privileges and Immunities Clause to an Alaska statute giving preference to residents in the development of the state-owned gas and oil. The Court struck down the statute, stating, "We do not agree that the fact that a State owns a resource, of itself, completely removes a law concerning that resource from the prohibitions of the Clause." *Id.* at 528.

[10] Petitioner does not concede that Lycoming County was acting as a market participant. As Chief Judge Gibbons recognized in his dissent, "the operation of a landfill is an integral, traditional governmental activity." (Page 52a, *infra*.) Further, the manner in which the County developed and operates the Landfill, clearly suggests that the purpose and effect of the County's actions were *to regulate* the disposal of trash. At best, its role is similar to that of the state in *Smith v. Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980), which owned and operated a farmers

As stated above, this Court's decision in *Philadelphia* reserved the question of the applicability of the Commerce Clause to state-owned landfills. The Third Circuit has now resolved this question by application of the market participant doctrine. This Court's decisions, however, have not extended that doctrine to state-owned natural resources. In fact, its decisions subsequent to *Philadelphia* strongly suggest that the hoarding of state-owned resources is fundamentally inconsistent with the purpose of the Commerce Clause. *See Reeves, Inc., supra; Wunnicke, supra.*

The market participant doctrine has been applied to permit states to spend their funds to benefit their residents, *Alexandria Scrap* and *White,* and to restrict sales of that which they produce to their residents, *Reeves, Inc.* It has not been, and should not be, extended to sanction the hoarding of natural resources by a state for the exclusive use of its residents. If such protectionist practices are permitted as exempt from the Commerce Clause, states will be encouraged to seek parochial solutions to national scarcity, to acquire and to hoard, for the sole benefit of their residents, natural resources whose location within their borders is mere happenstance. As this Court has recognized, the acquisition of scarce natural resources by a state for the purpose of barring access to non-residents cannot be reconciled with the core concerns that motivated the Commerce Clause. *See Reeves, Inc., supra; Wunnicke, supra.*

---

market but was not buying or selling a product. The Fifth Circuit concluded that the state, in this "hybrid role", could not discriminate against non-resident farmers who desired space at the market. *Cf. Western Oil & Gas Ass'n v. Cory,* 726 F.2d 1340 (9th Cir. 1984), *aff'd per curiam by an equally divided Court,* 471 U.S. 81 (1985) (state not market participant when imposing fee for transportation of oil across state-owned tidal and submerged lands).

III.

The Third Circuit's Decision Permitting Government-owned Landfills To Discriminate Against Out-of-State Trash Raises Urgent Problems Of National Dimension

It is beyond serious dispute that the disposal of solid waste is a national problem approaching crisis proportions. *See Philadelphia, supra,* at 630 (Rehnquist, J., dissenting); 42 U.S.C. §6901(a)(4) ("the problems of waste disposal . . . have become a matter national in scope and in concern . . .. "); "Municipal Waste Disposal Crisis," Hearings Before the House Subcommittee on Transportation, Tourism, and Hazardous Waste Materials, Serial No. 100-38, 100 Cong., 1st Sess. (1987). While the search continues for long-term solutions for reducing and disposing of the waste generated by the Nation, the use of landfills is, at the very least, an essential short-term measure. *See* Comment, *Municipal Solid Waste Regulation: An Ineffective Solution to a National Problem,* 10 Ford. Urb. L. Rev. 215, 217, 243 (1982). But appropriate landfill sites are scarce, and their geographical distribution reflects the happenstance of geological development rather than the rational product of human effort. Further, heavily populated and urbanized areas cannot readily develop landfill sites within their borders, yet these areas obviously generate the greatest need for landfill disposal. *See Id.* at 217. Thus, they are largely dependent on the national market to meet their waste disposal needs.[11] It is fundamentally unfair to permit state and local

[11] "[S]tates are so lacking in disposal capacity that cities ship their solid waste up to 850 miles just to use available disposal capacity." Kovacs and Anderson, *supra* note 8, at 783. The U.S. Environmental Protection Agency has adopted guidelines under the Resource Conservation and Recovery Act that call for states to "provide for . . . policies for free and unrestricted movement of solid and hazardous waste across State and local boundaries" 40 C.F.R. §256.42(h).

governments to acquire scarce landfill sites and withdraw them from the national market.[12] Those areas whose geologic and demographic characteristics permit the development of landfills are able to solve their solid waste problems, but only at the expense of the rest of the states, which find themselves ever more desperate for trash-disposal solutions.

The specter of state and local governments acquiring landfill sites and withdrawing them from the national market is no mere chimera. This phenomenon is already occurring around the country. *See, e.g., Lefrancois v. Rhode Island,* 669 F. Supp. 1204 (D.R.I. 1987); *Evergreen Waste Systems, Inc. v. Metropolitan Service District,* 643 F. Supp. 127 (D. Or. 1986), *aff'd,* 820 F.2d 1482 (9th Cir. 1987); *Shayne Bros., Inc. v. District of Columbia,* 592 F. Supp. 1128 (D.D.C. 1984); *Hancock Industries v. Schaeffer,* 619 F. Supp. 322 (E.D. Pa. 1985), *aff'd,* 811 F.2d 225 (3d Cir. 1987); *County Commissioners of Charles County v. Stevens,* 299 Md. 203, 473 A.2d 12 (1984). Significantly, 81 percent of all landfills are already owned by state and local governments. *See* 53 Fed. Reg. 33, 314 (1988) (to be codified at 40 C.F.R. pts. 257 and 258) (proposed August 30, 1988). Thus, the prospect of state and local governments banning out-of-state trash from their landfills is not an abstract or inconsequential threat to the essential interstate market in trash disposal. *Cf. Healy v. Beer Institute, Inc.,* U.S. , 109 S.Ct. 2491, 2499 (1989) (In Commerce Clause analysis, courts must consider "what effect would arise if not one, but many or every state adopted similar legislation.").

---

[12] As the Third Circuit recognized, "Unlike a manufactured product or the provision of a human service, a state does not have the ability to develop a natural resource if it has not had the fortuity to be favored with such a resource." (Page 31a, *infra.*)

In Pennsylvania the legislature recently enacted a law requiring counties to take primary responsibility for the disposal of waste generated within their borders.[13] As counties struggle to comply with their obligations under the new law, county-owned disposal facilities will become a practical solution, and exclusion of foreign trash a "logical consequence." *Hancock, supra,* 619 F. Supp. at 330. Since these facilities need not accept out-of-state trash under the Third Circuit's ruling, Pennsylvania will have effectively established the type of ban on out-of-state trash that was struck down in *Philadelphia, supra.*

In a related action, the Governor of Pennsylvania recently ordered that *private* landfills be restricted from receiving out-of-state trash. Executive Order 1989-8, 19 Pa. B. 4598 (October 28, 1989). Clearly, Pennsylvania politicians are succumbing to pressures to isolate it from the national market in trash and to hoard its landfill resources for its residents at the expense of those areas lacking in suitable landfill sites. Other states will not be far behind. *See, e.g., Washington State Bldg. & Constr. Trades Council v. Spellman,* 684 F.2d 627 (9th Cir. 1982), *cert. denied sub nom, Don't Waste Washington Legal Defense Foundation v. Washington,* 461 U.S. 913 (1983); Paul, "Waste Spurs Uncivil War Between States," *Wall Street Journal* (Nov. 17, 1989).

The Third Circuit's decision constitutes an invitation to state and local governments to deal with the national problem of solid waste disposal by Balkanizing themselves. Under increasing pressure to solve their trash disposal problems, state and local governments will inevitably conclude that operating their own landfills, from which out-of-state trash is banned, is

---

[13] *See* The Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101 et seq.

an attractive option. This option will be much more attractive to them if they can, as Lycoming County has, not only squelch local competition through a web of regulations, but also simultaneously erect barriers to out-of-state waste in the guise of market participation. *See* Kovacs and Anderson, *supra* note 8, at 786. It would be most unfortunate if the precedent of the Third Circuit's decision encourages the creation of many mutually hostile enclaves that discriminate against all external sources of waste. The inevitable proliferation of such protectionist practices "would create precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 286 (1977).

In *Philadelphia, supra*, this Court prophetically observed that, while New Jersey was then seeking to exclude Pennsylvania's trash, tomorrow might find Pennsylvania seeking to exclude New Jersey's trash. Tomorrow has arrived, and petitioner invokes this Court's promise that

> [t]he Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

Philadelphia, supra, at 629.

CONCLUSION

For the above-stated reasons, petitioner requests that the petition for certiorari be granted in order to correct the error of the Third Circuit and address the urgent issues presented herein.

Respectfully submitted,

JOHN P. KRILL, JR.*
CARLETON O. STROUSS
ANDREW H. CLINE
Attorneys for Petitioner
The Payne Shoemaker Building
240 North Third Street
Harrisburg, PA 17101-1503
(717) 231-4500
**Counsel of Record*

Date: 12.21.89

RICHARD A. GAHR*
428 Market Street
Suite 310
Williamsport, PA 17701
(717) 323-9177
**Of Counsel*

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
CIVIL NO. 87-1565
SWIN RESOURCE SYSTEMS, INC.
PLAINTIFF

VS.

LYCOMING COUNTY, DOLLY M. WILT, GENE SMITH, LORA P. MORNINGSTAR, AND WAYNE I. ALEXANDER
DEFENDANTS

MEMORANDUM AND ORDER

The Defendants herein are the County of Lycoming, the present Commissioners of the County, and the manager of the Lycoming County Solid Waste Department. The County is a political subdivision of the Commonwealth of Pennsylvania and operates a landfill in Lycoming County, through the Lycoming County Solid Waste Department. The landfill is situated on lands owned by the United States Bureau of Prisons and is operated under a permit granted to the County by the Bureau of Prisons.

The Plaintiff owns and operates a municipal solid waste processing facility in Hemlock Township, Columbia County, Pennsylvania. The Swin facility receives municipal solid waste from New Jersey and Eastern Pennsylvania. It separates tires, wood pallets, appliances and cardboard from other solid wastes. The items separated out are sold and shipped to businesses in Pennsylvania, other states, and other countries which have a commercial need for them. The solid waste which is not recycled is compacted into 40 inch by 30 inch by 60 inch bales in preparation for shipment to landfills. These bales are

transported to duly permitted landfills such as the landfill operated by the named Defendants.

By this action the Plaintiff seeks to enjoin the Defendants from imposing on it volume restrictions, and increased rates for disposal at the landfill. The increased rates were made effective by the Defendants as of September 14, 1987 and the Plaintiff argues these increased rates effectively prevent it from using the landfill.

The matter is presently before us on a motion to dismiss filed on behalf of all Defendants. The motion has been fully briefed and is ripe for disposition. Because we find no basis for federal court jurisdiction, we will grant the motion to dismiss.

I

The parameters of the motion are best outlined by referring to the arguments made by the Plaintiff against the motion to dismiss; they are as follows:

A. The imposition by the Defendants of arbitrary volume restrictions and discriminatory disposal fees violated the Commerce Clause of the United States Constitution.

B. Swin has an enforceable long-term contract with Defendants.

C. Swin has a "property right" for due process purposes and thus may pursue its Section 1983 claim.

D. Charging a prohibitively high rate to Swin violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

E. Swin may bring an action pursuant to 43 U.S.C. §931(c) and need not join the United States as an indispensable party.

In considering a motion to dismiss we accept as true all well-pleaded allegations and draw all inferences in favor of the non-moving party. We are cognizant, too, of the directions of guiding law which holds that a complaint should not be dismissed unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41; 75 S.Ct. 99, (1957); *Regency Catering Services v. City of Wilkes-Barre*, 640 F. Supp. 29 (M.D. Pa. 1985). In reaching our decision in this case we have in fact given to the Plaintiff the benefit of all reasonable inferences that can be drawn from the pleadings and, indeed, there is no dispute concerning the operative facts underlying this case.

The Plaintiff's argument concerning the alleged interference with interstate commerce is based on the constitutional grant of power to Congress to regulate commerce among the states. The purpose of that grant was expressed in *H.P. Hood, Inc. v. DuMond*, 336 U.S. 525, 537-38 (1949):

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the court said in *Baldwin v. Seelig*, 294 U.S. 541, 527, "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."

In later decisions the Supreme Court recognized that many subjects which might potentially come under federal regulation escape Congressional attention because of their local character, number and diversity. Thus in a series of cases the Supreme Court has outlined a distinction between the

actions of state and local governments when they are functioning as "regulators" of the market as opposed to when they are acting as "market participants". *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); and *White v. Mass. Council of Constr. Employers*, 460 U.S. 204 (1982). As those cases explain, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the National marketplace. There is no indication of a constitutional plan to limit the ability of the states themselves to operate uninhibited in the free market. Restraint of federal jurisdiction is counseled in these cases by considerations of state sovereignty, the role of each state as the guardian and trustee for its people and the long recognized right of trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal. Thus the courts have found that there is nothing in the purposes animating the Commerce Clause of the United States Constitution that prohibits a state (or a state agency) in the absence of specific Congressional action, from participating in the market and exercising the right to favor its own citizens over others.

Here, we find no effort by the Defendant agency to regulate or to tax the general operation of landfills. Rather, the actions alleged in the complaint perfectly describe a participant in the landfill market. A participant which has made certain determinations concerning its own competitiveness in the market as well as decisions to conserve its own resources. These are common decisions by market participants and have no bearing on the same determinations by others in the same market.

We find under the *Hughes, Reeves, White* and *Philadelphia* cases that Defendants' argument is compelling and there is no basis on which we could ascribe the restrictions of the Commerce Clause to this case.[1]

II

In arguing its due process claim, the Plaintiff alleges "it is a fundamental principle that valid contractual rights against a government body, both explicit and implicit, create property interests within the scope of the due process clause." The Plaintiff cites *Northern Pennsylvania Legal Services, Inc. v. The County of Lackawanna,* 513 F. Supp. 678 (M.D.Pa. 1981) and other cases cited therein for the proposition that such a due process right allows them to pursue a claim against the Defendants under the Civil Rights Act of 1871 which is now 42 U.S.C. §1983.

Further reference to the *Northern Pennsylvania* case however, undermines Plaintiff's contention:

> The complainants cannot obtain a federal forum merely because the County may have breached an agreement to which they are a party. To proceed on a substantive due process theory, NPLS and its attorneys must show that

---

[1] In his most recent writing on Constitutional law, Professor Lawrence H. Tribe, summarized the matter here as follows:

> Yet from another perspective, *Alexandria Scrap*, and its progeny, can be seen as ushering in a new day for federalism, one that allows state and local governments the freedom to experiment with different packages of benefits for their citizens without fear that they will have to share the contents with everyone else. Central heating is a marvelous thing, but it makes little sense in a house without walls. The market participant exception to the Commerce clause, as an aspect of the new federalism, encourages state and cities to improve the lives of their citizens by allowing the benefits they generate to be contained within their borders.

L. Tribe, *American Constitutional Law*, at 434 (2d ed. 1988).

> the deprivation was arbitrary, capricious or without a rational basis.

We find here then, in regard to the due process claim, that it is clear we are presented with no more than a breach of contract assertion. The Plaintiff's attempt to clear this hurdle by stating that Defendants' actions are "arbitrary and capricious" is belied by the substantial contract dispute that exists in this matter. The Defendants, in the pleadings, have presented this Court with what appears to be a valid defense for their actions. Although we will not reach the contract issue by disposing of the claim purely on jurisdictional grounds, the pleadings themselves establish that the Defendants' were not arbitrary or capricious. Here we quickly point out that this decision does not deprive the Plaintiff of a forum for the resolution of its argument with the Defendants, since it has an adequate state law remedy. *See Parratt v. Taylor*, 451 U.S. 527 (1981). In commenting on the impropriety of converting every breach of contract case to one in which federal jurisdiction is appropriate, the Court in *Ruman v. Com. of PA., Dept. of Revenue*, 462 F. Supp. 1355, 1361-62 (M. D. Pa. 1979), stated appropriately:

> Furthermore, what the complaint basically alleges is a breach of contract, and were we to adopt Plaintiff's theory of action pursuant to 42 U.S.C.§1983, any time Commonwealth officials were alleged to have breached a contract, a Plaintiff would have an action in federal court for deprivation of property without due process of law. We do not believe this was the intention of the Civil Rights Statute, especially when a state procedure for determining such a dispute exists.

See also Jiminez v. Almodana, 650 F.2d 363 (1st Cir. 1981); *Coastland Corp. v. County of Currituck*, 734 F. 2d 175 (4th Cir. 1984).

III

Regarding the Equal Protection argument presented here, the Plaintiff claims: "charging a prohibitively high rate to Swin violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

Here, the Plaintiff makes an argument that the Defendants pricing arrangement essentially excludes "out of County waste" and results in a "hoarding of a natural resource" which it argues is impermissible under the theory of the cases cited herein regarding the impermissible conduct of states in violation of the Commerce Clause. Plaintiff's argument that the decision of the Defendants to establish a system which essentially charges higher fees to out of the area waste haulers is such a burden on the Plaintiff as to be impermissible under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. We find to the contrary, however, and find that the Defendants have indeed a rational basis for their pricing mechanism. The price arrangements have been promulgated to expand the life of the landfill and to provide facilities for the longest possible time for the residents of the Lycoming County area. Any hole, no matter how large, can only accept a specific volume of garbage, and it would be foolhardy for the operators of this landfill not to plan ahead and to use appropriate measures to extend the life of that landfill as far as possible. We find, therefore, that the Plaintiff fails to make a case which would sustain federal jurisdiction under its alleged equal protection claim.

IV

Since we find the complaint fails to state any federal cause of action, F.R. Civ. Proc. 12 (b)(6), it is not necessary for us to reach the other arguments propounded in this complaint by the Plaintiff. Presuming that some of the other claims might be considered valid or pendent state claims, and presuming that the Plaintiff could avail itself of appropriate state forums to resolve those claims, it is proper under federal law to dismiss all of the claims in this complaint when we find no federal jurisdiction, although we do so without prejudice to the Plaintiff to restate these claims in a proper state forum. *See United Mineworkers v. Gibbs,* 383 U.S. 715 (1966).

Under the circumstances, we will dismiss this action without prejudice to the Plaintiff to reinstate its state claims in an appropriate forum if it so desired. An appropriate Order follows.

/s/Richard P. Conaboy

United States District Judge

DATE: February 10th, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
CIVIL NO. 87-1565
SWIN RESOURCE SYSTEMS, INC.

PLAINTIFF

VS.

LYCOMING COUNTY, DOLLY M. WILT, GENE SMITH, LORA P. MORNINGSTAR, AND WAYNE I. ALEXANDER

DEFENDANTS

ORDER

NOW, February 10th, 1988, because this Court finds the Plaintiff has failed to establish any basis for federal jurisdiction of the within matter, the Defendants' motion to dismiss the complaint is granted without prejudice.

/s/Richard P. Conaboy
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
CIVIL NO. 87-1565
SWIN RESOURCE SYSTEMS, INC.

Plaintiff

vs.

LYCOMING COUNTY, DOLLY M. WILT, GENE SMITH, LORA P. MORNINGSTAR, AND WAYNE I. ALEXANDER

Defendants

OPINION

On February 10, 1988, this Court entered an order dismissing this action and thereafter the Plaintiff filed a motion to alter or amend the judgment, or in the alternative for an injunction pending appeal. The matter has been briefed by both parties and for the reasons stated herein, we will deny the motion.

The following is a review of the arguments presented, and the Court's reasoning.

I

SWIN'S FEDERAL CLAIMS WERE NOT FRIVOLOUS OR WHOLLY UNSUBSTANTIAL; AND ACCORDINGLY, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

In pressing this argument the Plaintiff cites the Third Circuit's standard of review on a Federal Rule of Civil Procedure 12(b)(6) motion as follows:

> The relevant legal precept is a familiar one; in deciding a Rule 12(b)(6) motion, factual allegations of the complaint

are to be accepted as true and the complaint should be dismissed only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Reasonable factual inferences will be drawn to aid the pleader. Citing *D.P. Enterprises, Inc. v. Bucks County Community College*, 725 F. 2d 943 (3d Cir. 1984).

The Plaintiff goes on then to acknowledge that this Court followed the appropriate standard in considering the motion and in referring to *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957), and *Regency Catering Services v. City of Wilkes-Barre*, 640 F. Supp. 29 (M.D. Pa. 1985), but argues that this Court erred in its application of that standard to this case. The Plaintiff here disagrees with our finding that the Defendants were market participants in the operation of the landfill involved in this case, and argues that such a determination is a question of fact which could only be made on the development of a full record.

In this regard Plaintiff attaches to its motion for reconsideration an affidavit of a county employee associated with the initiation and operation of the landfill. While the propriety of the submission of that affidavit is discussed by both parties, the purpose of its submission, according to the Plaintiff, is to indicate that sufficient facts could be developed in this case to support the Plaintiff's theory that the Defendant is a regulator rather than a participant in the market and that the Court should not have granted judgment in favor of the Defendants without allowing further development of those facts.

The Defendants, more properly, in response, argue that this Court indeed did accept all of the pleaded facts in the Plaintiff's favor and that the affidavit, questionably submitted,

does not add anything of factual substance which would lead to a different determination.

Plaintiff here cites the case of *Western Waste Service v. Universal Waste Control,* 616 F. 2d 1094 (9th Cir. 1980) to bolster its argument that determination of the issue of whether a party is a market regulator or a market participant requires creation of a full record. *Western Waste,* however, was concerned with whether or not the activity of the Defendant "sufficiently effects Interstate Commerce to fall within the protection of §l of the Sherman Act". We were not faced in this case with the determination of whether or not the Defendants' activities affected interstate commerce but whether or not the Defendants attempted to tax or to regulate activities which are acknowledged to affect interstate commerce. In pressing its argument that whether a participant in interstate commerce has become a regulator is a factual question, Plaintiff argues:

> "If their activities expanded to all 67 counties of the Commonwealth, they would clearly be regulators and their limitations on accepting waste would be expressly prohibited by the Supreme Court's interpretation of the Commerce Clause in *City of Philadelphia v. New Jersey,* 437 U.S. 617, 98 S.Ct. 2531, 57 L.ed 2d 475 (1978) . . ."

This argument, on its face, goes beyond anything that was plead [sic] in this case and beyond anything that the pleadings or the assertions of the Plaintiff indicates could be proved in the course of a trial or in further pretrial factual development. This is the most expansive type of speculation and somewhat indicative of the unrealistic approach to what the Plaintiff claims is the factual background of this case. In deciding this matter as we did, we gave to the Plaintiff the benefit of all of

the facts alleged and any responsible inferences which could be developed from those facts. Indeed, we considered every argument now proposed by the Plaintiff in this motion for alteration or amendment of judgment. We find the Plaintiff therefore brings to our attention nothing which would cause us to grant the motion.

II

THE MARKET PARTICIPANT EXCEPTION IS NOT APPLICABLE TO THE HOARDING OF LANDFILL CAPACITY.

In pressing this argument Plaintiff claims that this Court should enforce a "per se" rule of violation of the Commerce Clause whenever governmental authorities seek to limit access to "a natural resource." They further argue that the Defendants here are "denying access to a natural resource on federal land." They assert further that under such circumstances a defendant should not be allowed to assert the "market participant status". In an effort to substantiate these assertions the Plaintiff cites *Reeves, Inc. v. Stake,* 447 U.S. 429, 100 S.Ct. 271 (1980); and *City of Philadelphia v. New Jersey,* 437 U.S. 617, 98 S.Ct. 2531, 57 L.ed. 2d 475 (1978). We find no such direction or prohibition in either of the cases cited by the Plaintiff. In *City of Philadelphia* the Court was called upon to decide whether a New Jersey law which prohibited entirely the importation of most solid or liquid waste which originated or was collected outside of the territorial limits of the state violated the Commerce Clause of the United States Constitution. In *Reeves* the Court was called upon to determine whether the action of the South Dakota Cement Commission violated the Commerce Clause of the United States Constitution when it confined the sale of cement it produced solely to the residents of the State of South Dakota. In the case before

us we find no such effort to regulate or prohibit the free flow of commerce by anyone in the same business as the Defendants.

Indeed, in the *Reeves* case, the Court discussed the distinction between states or municipalities acting as market participants and market regulators and indicated that the distinction "makes good sense and sound law". In doing so, it reviewed its own decision in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), which involved a program of the State of Maryland designed to remove abandoned automobiles from the state's roadways and junkyards. In that case, it was acknowledged that the law passed in Maryland imposed more exacting documentation requirements on out-of-state than on in-state processors, and thus essentially made the trade in such items much more attractive and economically rewarding to the citizens to the State of Maryland than to citizens of other states. The Court in making the distinction between a market participant and a market regulator however, held that "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead it has entered into the market itself to bid up their price, as a purchaser, in effect, of a potential article of interstate commerce and has restricted its trade to its own citizens or business within the state." In that context the Supreme Court characterized the State of Maryland as a market participant rather than a market regulator and found no reason to "believe the Commerce Clause was intended to require independent justification for the state's action." It was then, and is now, this Court's opinion that extending the guidance provided for in *Reeves, City of Philadelphia,* and *Alexandria Scrap,* to all of the facts possible and proper to consider in this case leads to the conclusion that

the Defendant indeed is a participant and not a regulator in the Commerce Clause context.[1]

III

SWIN IS ENTITLED TO EQUITABLE RELIEF.

In this part of its motion, the Plaintiff again argues that it is entitled to equitable relief enjoining the volume restrictions and pricing imposed on it by the Defendants, and further requiring the Defendants to accept waste from Swin at a "reasonable fee" pending resolution of this litigation.

In spite of the findings and conclusions in this Court's opinion, the Plaintiff here argues that it has demonstrated "a substantial likelihood of success on the merits". In making that argument this Court presumes that the Plaintiff is aware of the appropriate standards for this Court to consider in determining whether or not an injunction should issue. Basic to those standards is a finding that a party seeking an injunction does indeed have a substantial likelihood of success on the merits of its claim. *See Kennecott Corp. v. Smith*, 637 F. 2d 181 (3d Cir. 1987); *S.I. Handling Systems, Inc. v. Heisley*, 753 F. 2d 1244 (3d Cir. 1985).

We discussed in the initial opinion in this case why we felt there was no merit to the Plaintiff's claim as well as why we found a jurisdictional problem. We reiterate here that by this motion the Plaintiff has brought nothing to our attention which would change those findings and thus we remain with the determination that the Plaintiff has little chance of success

[1] The Plaintiff in this case acknowledges that the Defendant has not refused to do business with the Plaintiff but has merely set a price with which the Plaintiff disagrees. Additionally, Plaintiff argues that Defendant has breached a valid contract with the Plaintiff. We indicated in our prior memorandum that these issues can properly be litigated in state court, but factually they militate against the Plaintiff on the issues we discuss here.

on the merits of this action. We were not persuaded in the initial presentation of this case nor are we persuaded by the matters brought to our attention on this motion that the Plaintiff is entitled to injunctive relief and, therefore, this part of the motion will also be denied.

Finally, we note that Plaintiff has also sought oral argument on this issue, but we find that the matter was well and thoroughly briefed on each occasion and there is no need for oral argument and we will, therefore, deny that request.

/s/Richard P. Conaboy

United States District Judge

DATE: May 26, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
CIVIL NO. 87-1565
SWIN RESOURCE SYSTEMS, INC.

Plaintiff

vs.

LYCOMING COUNTY, DOLLY M. WILT, GENE SMITH, LORA P. MORNINGSTAR, AND WAYNE I. ALEXANDER

Defendants

ORDER

NOW, May 26, 1988, in conformity with the foregoing Opinion, IT IS ORDERED AS FOLLOWS:

1. The motion for oral argument is denied.

2. The motion to alter or amend the judgment or in the alternative, for an injunction pending appeal, is denied.

/s/Richard P. Conaboy
United States District Judge

Filed: August 25, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-5500

SWIN RESOURCE SYSTEMS, INC.,

Appellant

v.

LYCOMING COUNTY, PENNSYLVANIA, acting through the Lycoming County Solid Waste Department; WILT, DOLLY M.; and SMITH, GENE; and MORNINGSTAR, LORA P., all in their respective official capacities as Commissioners of Lycoming County, Pennsylvania and in each of their individual capacities; and ALEXANDER, WAYNE I., in his official capacity as General Manager of Solid Waste Facilities of the Lycoming County Solid Waste Department and in his individual capacity.

Appellees

On Appeal From the United States
District Court For the
Middle District of Pennsylvania
(D.C. Civil No. 87-1565)

Argued: October 31, 1988
Before: GIBBONS, *Chief Judge,* BECKER and
WEIS, *Circuit Judges*
(Filed August 25, 1989)

JOHN P. KRILL, JR., Esquire (Argued)
CARLETON O. STROUSS, Esquire
Kirkpatrick & Lockhart
The Payne Shormaker Building
240 N. Third Street
Harrisburg, PA 17101

RICHARD A. GAHR, Esquire
Gahr & Sholder
428 Market Street
Suite 310
Williamsport, PA 17701
Attorneys for Appellant

J. DAVID SMITH, Esquire (Argued)
PAUL J. RYAN, Esquire
McCormick, Reeder, Nichols,
Sarno, Bahl & Knecht
835 West Fourth Street
Williamsport, PA 17701
Attorneys for Appellee

OPINION OF THE COURT

BECKER, *Circuit Judge.*

Plaintiff-appellant Swin Resource Systems, Inc. ("Swin") owns and operates a solid waste processing facility in Hemlock Township, Columbia County, Pennsylvania. Defendant-appellee Lycoming County ("Lycoming"), a Pennsylvania county, operates a landfill in Brady Township, in Lycoming. The case at bar arises from Lycoming's decision to charge a lower rate for the reception and disposal of waste generated within Lycoming and nearby counties than for waste generated outside that area. In its complaint filed in the Middle District of Pennsylvania, Swin contended that this price difference violated the commerce clause by impermissibly interfering with and discriminating against interstate commerce, denied Swin equal protection of the laws and due process of law, violated a federal land leasing statute (43 U.S.C. §931c (1982)), and constituted a breach of contract. Named as defendants were Lycoming and various county officials.

The defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). With respect to the commerce clause claim, the defendants asserted that the marketing practices of the county-operated landfill fall within the protection of the so-called market-participant doctrine and hence escape scrutiny under the commerce clause. With respect to the equal protection claim, the defendants asserted that Lycoming's pricing scheme was rationally related to the legitimate purpose of presuming landfill capacity for local waste. With respect to the federal statutory claim, the defendants contended the statute did not give rise to a private right of action.

The district court, in an opinion reported at 678 F. Supp. 1116 (M.D.Pa 1988), agreed with the position of defendants

and held that Swin's federal claims (both constitutional and statutory) failed to state a claim upon which relief can be granted. It therefore dismissed these claims pursuant to Fed. R. Civ. P. 12(b)(6). It also dismissed the pendent state breach of contract claim for want of jurisdiction. Swin then filed a motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment and an alternative motion under Fed. R. Civ. P. 62(c) for an injunction pending appeal. Swin did not seek leave by this motion or otherwise to amend its complaint in order to present additional facts or theories in support of its claims. Swin did, however, attach to its motion papers a deposition of a county employee associated with the initiation and operation of the landfill supplying additional factual data.

The district court denied Swin's motions, and Swin appealed from the district court's order refusing to alter or amend the judgment. A timely appeal from a denial of a Rule 59 motion to alter or amend the judgment also "¡'brings up the underlying judgment for review.'¡" *Federal Kemper Insurance Co. v. Rauscher,* 807 F.2d 345, 348 (3d Cir. 1986) (citation omitted).

In deciding (and reviewing) a motion to dismiss for failure to state a claim upon which relief can be granted, a court must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom. The complaint may be dismissed "only if it is certain that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984). Facts contained in the deposition that Swin submitted must not be considered if they fall outside the ambit of the complaint. *See Biesenbach v. Guenther,* 588 F.2d 400, 402 (3d Cir. 1978). We will consider the facts stated in the deposition, to the extent that they fall within the ambit of the

complaint, as illustrative of those facts which Swin could prove if its complaint were reinstated.

On appeal Swin has abandoned its due process and pendent state claims. We are therefore faced with three questions: (1) whether the marketing practices of the county-operated landfill fall within the market participant doctrine and hence escape scrutiny under the commerce clause; (2) whether these marketing practices violate the equal protection clause; and (3) whether the federal land leasing statute creates a private right of action in Swin's favor. For the reasons that follow, we will affirm.

I. THE PLEADED FACTS

A. Swin's Complaint

On June 5, 1973 the United States Bureau of Prisons granted a thirty-year permit to Lycoming to operate a public landfill on a 130-acre parcel on the federal prison reservation in Allenwood, Pennsylvania. The permit required Lycoming to pay all expenses associated with operating the landfill and to dispose of certain Bureau of Prisons waste without charge. In May 1974, Lycoming applied for and subsequently received a grant from the Appalachian Regional Commission in connection with the construction and operation of the landfill. The county opened the landfill in 1978 and has continued to operate it since that time through the Lycoming County Solid Waste Department.

Swin's waste processing facility receives solid waste from Eastern Pennsylvania and New Jersey. Swin recycles some of the waste and sells it to businesses in several states. The remaining waste is compacted into bales and transported to landfills for disposal. Swin can produce 30 tons per hour of this baled solid waste and is presently producing an average of 300 tons per day.

On March 6, 1986, Lycoming notified Swin by letter that it would accept Swin's baled solid waste for a price in the "range of" $10 per ton, promising to give Swin the exact price after the completion of a waste study within the next month. The letter also indicated that higher rates applied to waste generated outside an area comprised of Lycoming, Union, Snyder, Northumberland, and Montour Counties and part of Columbia County, the other five counties being in the vicinity of Lycoming. Lycoming had apparently regarded Swin's baled waste as originating from within the 5 1/2-county area, since from November 1986 to January 1987 it accepted Swin's baled waste at the reduced rate. The landfill has sufficient capacity to serve the needs of both the 5 1/2 -county area and Swin during the term of the thirty-year Bureau of Prisons lease.

Beginning in January 1987, however, and continuing until September 14, 1987, Lycoming charged Swin $10 per ton for waste generated within Lycoming, $13.25 per ton for waste generated within the remaining counties of the 5 1/2 -county area, and $17.20 per ton (less $1.50 for unloading) for waste generated outside the 5 1/2 -county area. In March 1987, Lycoming instructed Swin to reduce the volume of waste it delivered to the landfill until a new field was "on line." Swin accordingly reduced its deliveries to 100 tons per day. Because of this volume limitation, Swin was compelled to scale back its business operations substantially, as other waste disposal sites were scarce, more distant, and more costly.

Effective September 14, 1987, Lycoming raised the rate for solid waste originating outside the 5 1/2 -county area to $30 per ton. Lycoming did not raise the $10 and $13.25 per ton rates for waste originating within the 5 1/2 -county area. Lycoming charged Swin the $30 per ton rate and limited Swin indefinitely to delivering 100 tons per day. Under these con-

ditions, Swin cannot economically use the Lycoming landfill, and it is no longer hauling waste there.

B. The Deposition Attached to Swin's Post-Judgment Motions

Swin submitted the deposition of Jerry Walls, the long-time Executive Director of the Lycoming County Planning Commission, the functions of which include planning how Lycoming residents are to dispose of their solid waste. According to the deposition, Lycoming received $1.3 million from the Appalachian Regional Commission to assist Lycoming in the construction of the landfill.

Walls describes the recycling system Lycoming has implemented to reduce the waste flow into the landfill. He testified that there were approximately nine to ten years of capacity left in the landfill. In addition, Walls describes the steps Lycoming took to ensure that enough municipalities used its landfill to enable Lycoming to pay back the landfill's long-term indebtedness with user revenues. The Planning Commission developed a model municipal ordinance (subsequently adopted by a number of Lycoming municipalities) that permitted Lycoming to designate the landfill (or transfer station) to which a municipality's waste haulers brought the waste they collected. Lycoming also entered into long-term disposal contracts with a number of municipalities.

II. THE COMMERCE CLAUSE CLAIM

The commerce clause grants Congress the power "[t]o regulate Commerce ... among the several States...." Art. I, §8, cl. 3. The Supreme Court, however, has long interpreted the clause to prohibit states from taking certain actions respecting interstate commerce even absent congressional action. *See, e.g., Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298, 319 (1852). The commerce clause has been so construed in order

to preserve "our national solidarity" by preventing the "rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935); to promote "[t]he material success that has come to inhabitants of the states which make up this federal free trade unit," *H.P Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949); and in recognition that "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state," *South Carolina State Highway Department v. Barnwell Brothers, Inc*, 303 U.S. 177, 185 n.2 (1938).

A. The Market Participant Doctrine

Swin contends that Lycoming's attempt to preserve its landfill's capacity for local residents by charging a higher price to dispose of distant waste in the landfill (and limiting the volume of distant waste accepted by the landfill) constitutes an impermissible interference with and discrimination against interstate commerce in violation of the commerce clause. The district court granted the defendants' motion to dismiss the commerce clause claim on the ground that Lycoming had acted as a "market participant." Under the market participation doctrine, a state or state subdivision that acts as a market participant rather than a market regulator "is not subject to the restraints of the Commerce Clause." *White v. Massachusetts Council of Construction Employers, Inc*, 460 U.S. 204, 208 (1983).

Application of the distinction between "market participant" and "market regulator" has, however, occasioned considerable dispute in the Supreme Court's jurisprudence. The

author of each of the three opinions that applied the doctrine—*Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (Powell, J.); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (Blackmun, J.); *White*, 460 U.S. 204 (Rehnquist, J.)—authored a dissent in the next, the pattern being maintained by Justice Rehnquist's dissent in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 101 (1984), the principal case in which application of the doctrine resulted in a conclusion that the state was not a market participant. The Court has expressly reserved the question whether state operation of a landfill may fall within the market participant doctrine. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6 (1978).

For the reasons explained below, we hold that Lycoming County acted as a market participant rather than a market regulator in deciding the conditions under which Swin could use its landfill. It is useful to begin our anaysis with a review of the four principal market participant cases.

In *Alexandria Scrap*, the Supreme Court upheld Maryland's statutory scheme to rid the state of derelict automobiles, even though the scheme entailed two types of discrimination: (1) Maryland paid bounties to in-state scrap auto hulk processors while refusing to pay bounties to out-of-state processors on the same terms, and (2) Maryland paid bounties only for vehicles formerly titled in Maryland. 426 U.S. at 797, 801. The Court held that the statutory scheme was consistent with the commerce clause on the ground that Maryland was participating in the market rather than regulating it. *Id.* at 809-10. As the majority put it, "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810 (footnotes omitted).

In *Reeves*, the Court upheld a South Dakota policy of confining the sale of cement by a state-operated cement plant to residents of South Dakota in order to meet their demand during a "¡'serious cement shortage.'¡" 447 U.S. at 432. The Court affirmed "[t]he basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators" and concluded that "South Dakota, as a seller of cement, unquestionably fits the 'market participant' label." *Id.* at 436, 440. The Court upheld the South Dakota policy even though Reeves, a Wyoming corporation that had purchased about 95% of its cement from South Dakota's state-operated plant for over twenty years, was forced to cut production by over 75% as a result of the policy. *Id.* at 433, 452 n.4.

In *White*, the Court, deeming the case "well within the scope of *Alexandria Scrap* and *Reeves*," upheld an executive order of the Mayor of Boston requiring all construction projects funded in whole or in part either by city funds or city-administered federal funds to be performed by a work force of at least 50% city residents. 460 U.S. at 211 n.7, 205 n.1. Justice Blackmun's dissent emphasized that the city "ha[d] imposed as a condition of obtaining a public construction contract the requirement that *private firms* hire only Boston residents for 50% of specified jobs," hence regulating whom private employers might hire. *Id.* at 217. Although the majority agreed that for the action to fall within the market participant doctrine there must be "some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business," it found it "unnecessary ... to define those limits with precision" as "[i]n this case ... [e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'¡" *Id.* at 211 n.7.

In *Wunnicke,* however, a plurality struck down Alaska's requirement that timber taken from state lands be processed in-state prior to export. Adhering to the distinction suggested in *White,* the plurality held that "[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but [does not] allow[ ] it to ... impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." 467 U.S. at 97. The Alaska policy crossed the line distinguishing participation from regulation because the conditions it attached to its timber sales amounted to "downstream regulation of the timber-processing market in which it is not a participant." *Id.* at 99.

Application of the teaching of these four cases, with one caveat discussed below, readily leads us to the conclusion that Lycoming County's marketing of its landfill constitutes market participation rather than regulation. We see Lycoming as a market participant in the market for disposal services: the discrimination to which Swin objects is embodied only in rules concerning the price and volume conditions under which persons may use the disposal service that Lycoming itself offers. In setting these price and volume conditions, Lycoming has not crossed the line that Alaska crossed when that state attempted to regulate the timber-processing market by conditioning its timber sales on guarantees that the purchasers would act in a certain way in a downstream market. The price and volume conditions to which Swin objects do not pertain to the operation of private landfills and do not apply beyond the immediate market in which Lycoming transacts business.

If Maryland may decree that only those with Maryland auto hulks will receive state bounties, it would seem that

Lycoming can similarly decree that only local trash will be disposed of in its landfill on favorable terms. If South Dakota may give preference to local concrete buyers when a severe shortage makes that resource scarce, it would seem that Lycoming may similarly give preference to local garbage (and hence local garbage-producing residents) when a shortage of disposal sites makes landfills scarce.[1] And if Boston may limit jobs to local residents, we see no reason why Lycoming may not limit preferential use of its landfill to local garbage (and hence local garbage-producing residents).

Swin argues that Lycoming cannot be a market participant because the landfill is on federal government land and its start-up costs were paid for, in part, with federal funds. But the identity of Lycoming's lessor is irrelevant, and a federal subsidy cannot distinguish Lycoming's preference for local garbage from Boston's hiring preference for jobs on construction projects funded by city-administered federal grant money.

Judge Gibbons states that "[t]here is no principled way to distinguish" the case at bar from *Wunnicke* because Lycoming's restrictions on what garbage may be dumped in its landfill "affects" the "patterns of trade between concerns like Swin and its waste suppliers in New Jersey." Diss. Op. Typescript at 5-6. With respect, Judge Gibbons reads *Wunnicke* too broadly. It does not hold that local governments will not be deemed market participants merely because of some inciden-

---

[1] Judge Gibbons attempts to distinguish the case at bar from *Reeves* by asserting that cement manufacturing is "a highly competitive market dominated by private enterprise." Diss. Op. Typescript at 6. This assertion, however, is contradicted by the facts of *Reeves* itself. The State of South Dakota built the cement plant at issue in that case not to compete with those operated by private enterprises but because no cement plant was operating in the state. *See* 447 U.S. at 430-31 & n.1.

tal effect on trade. In *Wunnicke*, the state's conditions on sales of state timber, by their own terms, set down rules as to what may be done with the timber with respect to activities quite distinct from the market transactions in which the state was engaged; in the case at bar, by contrast, Lycoming's conditions on what garbarge may be dumped in its landfill do not, by their own terms, regulate what may be done with the garbage outside of the market transactions in which Lycoming is engaged.

No court, to our knowledge, has ever suggested that the commerce clause requires city-operated garbage trucks to cross state lines in order to pick up the garbage generated by residents of other states. If a city may constitutionally limit its trucks to collecting garbage generated by city residents, we see no constitutional reason why a city cannot also limit a city-operated dump to garbage generated by city residents.[2] ¡With respect to municipal garbage trucks and municipal garbage dumps, application of the market participant doctrine enables "¡'the people [acting through their local government] to determine as conditions demand ... what services and functions the public welfare requires.'¡" *Reeves*, 447 U.S. at 438 n.11 (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J.,

---

[2]¡Judge Gibbons states that "the operation of a municipal landfill is no more an entry into a local market than is the operation of a municipal school system." Diss. Op. Typescript at 6-7. We know of no case, however, that holds that municipalities must permit out-of-state students to matriculate in its public schools on equal terms with in-state students in order to comply with the commerce clause. Indeed, the Supreme Court has summarily affirmed a decision upholding a state statute requiring out-of-state students to pay higher tuition than in-state students in order to attend a state university, *see Sturgis v. Washington*, 414 U.S. 1057, *aff'g mem.* 368 F. Supp. 38 (W.D. Wash. 1973) (three judge court), and has upheld state residence requirements governing entitlement to tuition-free public schooling on the ground that a residence requirement "furthers the substantial state interest in assuring that services provided for its residents are enjoyed only be residents." *Martinez v. Bynum*, 461 U.S. 321, 328 (1983). *See also Reeves*, 447 U.S. at 442.

concurring)). The residents who reside within the jurisdiction of a county or municipality are unlikely to pay for local government services if they must bear the cost but the entire nation may receive the benefit.

Judge Gibbons reads *Wunnicke* as "suggesting that the limit of the market participant exception must at least be the 'narrowly defined' market in which the state participates." Diss. Op. Typescript at 4. That test is met here. As we have already intimated, the distinction between market participant and market regulator is problematic, and Judge Gibbons' arguments with respect to the difficulties of the market participant doctrine are not without force. We are satisfied, however, that within the existing Supreme Court cases, Lycoming clearly falls on the market participant side of the line.

B. Does a "Natural Resource" Exception Apply Here?

Swin's vigorous argument that Lycoming has attempted to harbor a scarce natural resource for its own residents brings us to the potential caveat we mentioned. While the harboring of a scarce manufactured product or human service does not preclude the invocation of the market participant doctrine because it is scarce (in *Reeves* the Supreme Court applied the doctrine to South Dakota's effort to harbor cement for its own residents despite a serious cement shortage), it may be that there is some special rule to be applied to a state's effort to harbor a scarce *natural* resource. Unlike a manufactured product or the provision of a human service, a state does not have the ability to develop a natural resource if it has not had the fortuity to be favored with such a resource. While it may seem fair for South Dakota to favor its citizens in the sale of cement from a state-owned cement plant, for a state to favor its own citizens in selling rights to mine coal or limestone on state-owned lands, for example, or in selling state-owned coal

or limestone, would seem less fair, especially if the state happened to be endowed with the bulk of our nation's coal or limestone reserves and the other states were dependent upon it.

The Supreme Court has not squarely faced this issue, although it has noted its concern that a state's endowment with a natural resource is a product of happenstance rather than hard work. In *Reeves*, the cement case, the Court noted that

> [c]ement is not a natural resource, like coal, timber, wild game, or minerals. It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials. South Dakota has not sought to limit access to the State's limestone or other materials used to make cement.... Moreover, petitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement. Whatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which *by happenstance* are found there, those limits do not apply here.

447 U.S. at 443-44 (emphasis added; citations and footnotes omitted).

Similarly, in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), a case which upheld against a commerce clause challenge much of Nebraska's scheme to control the sale of groundwater, the Court, citing *Reeves*, stated that "given [Nebraska's water] conservation efforts, the continuing availability of ground water in Nebraska is *not simply happenstance;* the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." 458 U.S. at 957 (emphasis added). And in *Wunnicke*, the Alaska downstream timber regulation case, the Court noted in passing that an "element[ ] ... not present in

Reeves" but present in the Alaska case was the "involve[ment]" of a "natural resource." 467 U.S. at 96. *Cf. New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982) (characterizing *Reeves* as establishing that "a state may confine to its residents the sale of products it *produces*" and refusing to characterize as market participation New Hampshire's efforts to limit out-of-state sale of hydroelectric power generated by a privately owned power company from a river assertedly owned by the state).

Interpreting the Supreme Court's passing remarks as to the possible inapplicability of the market participant doctrine in a natural resource case is no easy task. The purported basis of the market participant doctrine is that "¡'[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.'¡" *White*, 460 U.S. at 207 (quoting *Alexandria Scrap*, 426 U.S. at 810 (footnotes omitted)). The Court in *Reeves* also quoted this sentence, emphasizing its "unmistakably broad terms." 447 U.S. at 436. Hence, despite the Supreme Court's dicta, excepting natural resources from the reach of the doctrine is inconsistent with the doctrine's theoretical foundation, as a state selling a natural resource is "participating in the market."

Whether there is a natural resource exception to the market participant doctrine is a difficult question, but, fortunately, one which we need not answer at this level of abstraction. First, land, the natural resource at issue here, cannot be used for a landfill without the expenditure of at least some money to prepare it for that purpose. The Lycoming landfill is therefore "not simply happenstance," *Sporhase*, 458 U.S. at 957, but is at least to some extent like South Dakota's cement

plant in that government funds were needed to construct it. Moreover, since the land upon which the landfill was constructed had to be leased in this case, the land, even prior to development, bore some resemblance to South Dakota's cement plant in that its devotion to public use required the disbursement or promise of future disbursement of government resources. *Cf. Sporhase,* 458 U.S. at 957 (In light of Nebraska's conservation efforts, groundwater, a paradigmatic natural resource, "has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage.").

A second complication in relying upon a natural resource exception in the instant case flows from the idea that local benefits should follow local burdens, which has in the past been relied upon by the Supreme Court in holding that state authorities can discriminate against out-of-state residents, even in cases involving a natural resource. *See Sporhase, supra; cf. Baldwin v. Fish & Game Commission of Montana,* 436 U.S. 371, 389-90 (1978) (Montana law charging residents $9 and nonresidents $225 for an elk hunting license held not to violate equal protection because state devoted resources to elk conservation). Waste disposal is unlike some other natural resource industries in that few communities welcome the opening of a waste disposal site in their midst. The opening of the site is often viewed as a threat to property values and quality of life that is acceptable only because of the pressing need for waste disposal.[3]

---

[3] *See generally* State of New Jersey County and Municipal Government Study Commission, *Solid Waste Management in New Jersey* 52-53 (1987) ("*Clearly, the siting function is the most difficult of all planning tasks contained in the [New Jersey] Solid Waste Management Act.* The simple truth is that people do not want a disposal facility, whether it be a mass-burner or a landfill, located in their neighborhood or community. The specter of smoke, odors, polluted water supplies,

A third complication is that categorizing a landfill as a "natural resource" simply because it is built on land proves too much. Since we can presume that South Dakota's cement plant was built on land, the mere fact that a state uses land to participate in the market cannot by itself preclude it from relying on the market participant doctrine. A land-use natural resource exception to that doctrine, if there be one, must rest upon a more particularized inquiry. Rather than land in general, one might consider the natural resource to be land that is practicably available for the construction of a landfill. Such land could, presumably, be distinguished from land available for the construction of a cement plant through the introduction of evidence that land available for cement plants is plentiful and land available for landfills is scarce.

Although it would makes some sense (in light of the cement-plant-on-land problem) to distinguish between land in general and land practicably available for the construction of landfills, it would nevertheless be problematic to use such

---

fleets of garbage trucks, and windblown refuse convinces much of the public that there has to be a different location for garbage disposal. Citizens have become very emotional and adamant on this issue."); Shapiro, *The Process of Resource Recovery Siting*, 9 Seton Hall Leg. J. 403, 403 (1985) (discussing the severe NIMBY—"not in my back yard"—problem in New Jersey with respect to solid waste disposal); Mathesius, *The Functions of Psychology, Process and Entropy in the Siting of Solid Waste Disposal Facilities*, 9 Seton Hall Leg. J. 415 (1985) (same); Sandman, *Getting to Maybe: Some Communications Aspects of Siting Hazardous Waste Facilities*, 9 Seton Hall Leg. J. 437 (1985) (same); McGuire, *The Dilemma of Public Paticipation in Facility Siting Decisions and the Mediation Alternative*, 9 Seton Hall Leg. J. 467 (1985) (same); Alm, *"Not in My Backyard"; Facing the Siting Question*, 10 EPA J. 8 (Oct. 1984) (NIMBY problem throughout nation with respect to solid waste disposal); Glaberson, *Coping in the Age of "Nimby"*, N.Y. Times, June 19, 1988, §3, at 1, col. 2 (same); Comment, *Down in the Dumps and Wasted: The Need Determination in the Wisconsin Landfill Siting Process*, 1987 Wis. L. Rev. 543, 545 n.13 (NIMBY problem in Wisconsin with respect to solid waste disposal); O'Hare, *"Not On My Block You Don't"; Facility Siting and the Strategic Importance of Compensation*, 25 Pub. Pol'y 407 (1977) (benefit-cost ansylsis of the problem).

an availability figure to determine whether landfills constitute a natural resource. Shortages of land available for landfill construction may be created by vigorous local opposition to using geologically suitable land to build landfills or by a state's hesitation, in light of the financial cost, to build landfills on geologically suitable land that it has already permitted to be dedicated to residential, commercial, industrial, or recreational use. To the extent that a shortage of landfill-available land is caused by such political factors, characterizing landfill-available land as being in short supply (and hence distinguishable from land available for cement plants) would seem inconsistent with a "happenstance" rationale for the natural resources exception to the market participant doctrine, as past and present political choices are not the product of geological happenstance.

In light of these considerations, we conclude that while there may be some place for a natural resource exception to the market participant doctrine, such an exception should not apply in the instant case. The present case is not one in which a state has "hoard[ed] resources which by happenstance are found there." *Reeves*, 447 U.S. at 444. Rather, a state subdivision has used initiative to build a waste disposal facility to serve its needs. Furthermore, given Lycoming's recycling program, one could say, as the Supreme Court did with respect to Nebraska's water conservation program, that "the continuning availability of [the landfill] is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." *Sporhase*, 458 U.S. at 957. We also take cognizance of the difficulties often attendant in efforts by municipalities to build waste disposal sites in light of their unpopularity with local residents. Neither the sacrifice of local resi-

dents in allowing a landfill to be built nearby nor the political character of much of the shortage of land available for landfill construction should be ignored.

This is not a case in which a state has hoarded a resource like coal or oil that is geologically peculiar to that state (although even with respect to such a natural resource, the Supreme Court has permitted states to exploit their monopoly position by exporting tax burdens to other states through facially neutral tax statutes, *see, e.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 & n.8 (1981)). Nor is this a case in which a state has used its ownership of land to discriminate against the transportation of goods in interstate commerce. *Cf. Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987) (city not a market participant where it assesses franchise fee on oil company seeking to build oil pipeline beneath city streets), *cert. denied*, 108 S. Ct. 2901 (1988); *Western Oil & Gas Association v. Cory*, 726 F.2d 1340 (9th Cir. 1984) (state not market participant in imposing fee for transportation of crude oil from offshore oil rigs across state-owned tidal and submerged lands), *aff'd without opinion by an equally divided Court*, 471 U.S. 81 (1985). These right-of-way or transportation cases raise a discrete set of concerns, as open "channels of commerce ... are essential to the market itself" because they are "essential to [an outsider's] ability to do business in the state." Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097, 1132-33 & n.188 (1988).

C. Summary

The Supreme Court has repeatedly affirmed the principle that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Alexandria Scrap*,

426 U.S. at 810 (footnotes omitted). We are not persuaded that a county's rules as to who may use its landfill are sufficiently suggestive of abuse of state power for us to depart from this principle. Other courts which have faced the issue whether public entities operating state landfills are market participants have come to the same conclusion.[4] ¡Because we conclude that under the pleaded facts Lycoming has acted as a market regulator rather than a market participant, we will affirm the district court's dismissal of Swin's commerce clause claim.

Judge Gibbons would bypass our analysis in its entirety and hold that the Supreme Court effectively overruled the market participant doctrine cases in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). That Congress has a (virtually) absolute authority to enact legislation affecting the operation of state governments, as *Garcia* held, does not, however, imply that the federal courts should hold unconstitutional state action previously held constitutional as falling within the market participant doctrine. *Garcia* permits Congress to require state-operated landfills to accept out-of-state garbage on terms equal to those governing the acceptance of in-state garbage or to overturn the market

---

[4] ¡*See County Comm'rs of Charles County v. Stevens*, 299 Md. 203, 473 A.2d 12 (1984); *Lefrancois v. Rhode Island*, 669 F. Supp. 1204 (D.R.I. 1987); *Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 643 F. Supp. 127 (D.Or. 1986), *aff'd on different grounds*, 820 F.2d 1482 (9th Cir. 1987); *Shayne Bros., Inc. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984); *but cf. Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982) (holding state not a market participant in closing its borders to out-of-state low-level radioactive waste since "measure denies entry of waste at the state's borders rather than at the site the State is operating as a market participant" and "measure establishes civil and criminal penalties which only a state and not a mere proprietor can enforce"), *cert. denied*, 461 U.S. 913 (1983). *See generally* Comment, *Recycling* Philadelphia v. New Jersey: *The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. Pa. L. Rev. 1309 (1989).

participant doctrine in its entirety. *Garcia* does not require the Courts of Appeals to do so absent Congressional action.

And even if Judge Gibbons is correct in reasoning that *Garcia* undermined the logical basis for the market participant doctrine cases, we lack the authority to overrule them. "If a [Supreme Court] precedent ... has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Rodiguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917, 1921-22 (1989).

III. THE EQUAL PROTECTION CLAIM

In light of Justice Stone's insight that a state law principally harming those outside the state is unlikely to be subject to the political restraints normally brought to bear on laws adversely affecting those within the state, *see South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177, 184 n.2 (1938), and his theory that courts should most carefully scrutinize the constitutionality of legislation harming those at a disadvantage in the political process, *see United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (citing *Barnwell Brothers* n.2), one might expect a high level of judicial solicitude for claims that a state or state subdivision has discriminated against out-of-state residents. The Supreme Court, however, has repeatedly held that a statute being challenged by those asserting such an equal protection claim, in a case "impinging upon no fundamental interest," is to be reviewed under the rational basis standard that is normally used in matters of economic regulation. *Alexandria Scrap*, 426 U.S. at 813. *See, e.g., Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 178 (1985); *Western*

& *Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 657 (1981); *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371, 391 (1978).

The equal protection clause is satisfied, under this standard, as long as the legislature "rationally could have believed" that the statutory classification would promote a legitimate objective. Whether the statutory classification is "in fact" successful in accomplishing that objective is irrelevant. *Western & Southern Life Insurance Co.*, 451 U.S. at 672 (emphasis omitted). States are "accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam). A statutory classification "need not be drawn so as to fit with precision the legitimate purposes animating it." *Alexandria Scrap*, 426 U.S. 813. And economic legislation "¡'carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality'¡" such that "¡'the varying treatment of different groups ... is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'¡" *Kadrmas v. Dickinson Public Schools*, 108 S. Ct. 2481, 2489 (1988) (citations omitted).

Swin argues that the asserted purpose of the disparate pricing scheme, to extend the useful life of the landfill to those within the Lycoming area, is illegitimate. We faced this issue in *Hancock Industries v. Schaeffer*, 811 F.2d 225 (3d Cir. 1987), a case also involving a county's efforts to exclude nonlocal waste as a means of preserving landfill capacity. We readily concluded that "providing for the continued disposal of ... County trash is a legitimate interest of the [County]

Authority and would constitute a legitimate purpose for the exclusionary policy under [equal protection] attack." 811 F.2d at 238. Countless cases have held that caring for local or regional needs is a legitimate purpose of local government. *See, e.g., Northeast Bancorp,* 472 U.S. at 177-78; *Martinez v. Bynum,* 461 U.S. 321, 328 (1983); *Western & Southern Life Insurance Co.,* 451 U.S. at 672; *Alexandria Scrap,* 426 U.S. at 814; *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 528 (1959).

Swin also argues that even if preserving landfill capacity for the residents of the Lycoming County area is a legitimate purpose, the pricing scheme is not rationally related to that purpose. We agree with the district court, however, that "[a]ny hole, no matter how large, can only accept a specific volume of garbage," 678 F. Supp. at 1119. Charging higher prices for the disposal of distant garbage, thus reducing the flow of such garbage to the landfill, is manifestly related to the objective of preserving landfill capacity for local garbage. Our decision in *Hancock* is in accord with this view. *See* 811 F.2d at 238-39.

Lycoming's pricing scheme is rationally related to the legitimate purpose of preserving the landfill for local waste-producing residents. No more is required. We will affirm the district court's dismissal of Swin's equal protection claim.

IV. THE 43 U.S.C. §931c CLAIM

Swin contends that Lycoming has violated 43 U.S.C. §931c (1982), which authorizes appropriate federal administrators to lease "public lands ... of the United States" to

> States, counties, ... municipal corporations, or other public agencies *for the purpose of constructing* and maintaining on such lands public buildings or other *public works.* In the event such lands cease to be used for the purpose

> for which such permit, lease, or easement was granted, the same shall thereupon terminate.

43 U.S.C. §931c (emphasis added). Swin argues that Lycoming's restrictions on the use and cost of using the landfill deprive the landfill of its "public" character in violation of the statute. The threshold issue, however, is whether this statute creates a right of action permitting Swin to seek to enjoin its asserted violation.

Conceding that the statute does not contain an express right of action permitting it to sue, Swin contends that an implied right of action exists in its favor. In determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, our task is one of statutory construction. The ultimate question in cases such as this is whether "Congress intended to create the private remedy ... that the plaintiff seeks to invoke." *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 91 (1981). "[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Id.* at 94.

Nothing in the language or statutory structure of this statute indicates that Congress intended private parties to be able to sue under the statute. Nor is there any indication that Swin is among the class for whose "especial benefit" the statute was enacted, a consideration which the Supreme Court has held important in deciding whether Congress intended to create a private right of action. *See Cort v. Ash*, 422 U.S. 66, 78 (1975). The legislative history of the statute explains only that the legislation is

> urgently needed to permit States and their local subdivisions to secure a tenure of use of sufficient duration to justify the expenditure of funds by State and local bodies for improvements of a permanent nature. Under present law some Federal agencies have no authority to issue long-term use permits, even to State and local public bodies. As a result local governmental units cannot afford to make substantial investments for improvements on such land with no guaranty of tenure, nor can they find a market for revenue bonds to finance the improvements.

H.R. Rep. No. 2243, 83rd Cong., 2d Sess. 1, *reprinted in* 1954 U.S. Code Cong. & Admin. News 3922, 3922. Nothing in the legislative history suggests that a private party in a position such as Swin has a right to sue under the statute. In light of these considerations, we conclude that Swin does not have a right of action under 43 U.S.C. §931c.

V. CONCLUSION

For the foregoing reasons the judgment of the district court will be affirmed.

Gibbons, *Circuit Judge,* dissenting.

The majority opinion holds that Lycoming County's operation of a landfill falls within the "market participant" exception to the dormant Commerce Clause. This conclusion misapplies the Supreme Court's most recent limitation of this peculiar doctrine. It also fails to consider that exception in light of *Garcia v. San Antonio Metropolitan Transportation Authority,* 469 U.S. 528 (1984). In consequence, finally, it ignores the market participant exception's economic unreality. Since neither this particular application of the exception, nor the exception itself, survives these considerations, I dissent from part II of the majority opinion.

I

Thirteen years ago in a peculiar eruption of Dixieism, the Supreme Court announced that the dormant Commerce Clause (unexercised by Congress) did not reach local government from "non-governmental" participation in the market. *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794 (1976). On the same day the Supreme Court, manifesting the same disease, also declared that the Commerce Clause granted Con-

gress no power to regulate local governments' "governmental" functions. *National League of Cities v. Usery*, 426 U.S. 833, (1976). *Garcia* has since expressly dispensed with the doctrine of *National League of Cities*, 469 U.S. at 531. In so doing, it also effectively eliminated the Dixiecrat basis for *Alexandria Scrap*, its progeny, and the market participant exception.

When *Alexandria Scrap* first carved out the market participant exception to the federal law on the dormant or unexercised reach by the Commerce Clause it did so narrowly. The case involved a Maryland statutory scheme designed to rid the state of derelict automobiles by granting wreckers who brought such vehicles to a licenced scrapper a bounty to be shared between the two. An amendment placed a higher administrative burden on out-of-state scrappers applying for the bounty than on their Maryland counterparts, 426 U.S. at 795-99. The Court held that the amendment was not an impermissible burden on interstate commerce. Justice Powell, writing for the majority, noted that Maryland had not attempted to regulate the flow of interstate commerce by placing limits on goods before they could move beyond the state's borders. Rather, the Court concluded that Maryland had in effect entered the market as a participant by making goods more lucrative if processed within the state. *Id.* at 807. It was in this context that the Court more generally opined that the Commerce Clause does not prohibit states "from participating in the market and exercising the right in favor of its citizens." *Id.* at 809-10.

The Court expanded *Alexandria Scrap* into a categorical exception to the unexercised Commerce Clause in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1976). It also applied the doctrine to the prohibition of goods from leaving a state rather than merely the inducement of goods into a state. *Reeves* involved

a South Dakota policy restricting the sale of cement produced at a state-owned plant to state residents. *Id.* at 431-34. Justice Blackmun, relying in part on *National League of Cities*, postulated a fundamental distinction between states as market regulators and states as market participants. The Court read *Alexandria Scrap* as holding that "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." *Id.* at 429.[1] ¡Making this categorical distinction, the *Reeves* court concluded that the negative Commerce Clause did not bind regardless of whether a state "market participant" attempted to attract interstate commerce from without or to impede it from leaving within. *Id.* at 444 n.17.

The Court widened the market participant exception still further in *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983). *White* dealt with an executive order of the Mayor of Boston requiring that all construction projects funded in whole or in part by city money to be performed by a work force composed of at least 50% Boston residents. 460 U.S. at 211. In an opinion by Justice Rehnquist, the Court upheld this local resident condition by reading *Alexandria Scrap* and *Reeves* as standing for "the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." 460 U.S. at 208. Justice Blackmun, the author of *Reeves*, dissented on the ground that the majority position would effectively permit any degree of market participation to render a state activity immune from Commerce Clause intrusion, 460 U.S. 216-25 (Blackmun, J. dissenting).

---

[1] ¡*Reeves* also paradoxically counseled against interfering with states in their non-sovereign capacity as market participants on grounds of state sovereignty, 447 U.S. at 429.

The Court eventually had second thoughts, limiting the market participant exception in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), a decision that would place the Lycoming County landfill outside the doctrine. In *South-Central Timber*, the Court held that an Alaska regulation mandating the in-state processing of timber from state lands prior to export did not enjoy an implicit Congressional sanction from a parallel policy for timber harvested from Federal land. *Id.* at 87-93. Writing for a plurality, Justice White went on to reject Alaska's contention that regulation fell within the market participant doctrine. The plurality distinguished *Alexandria Scrap* by noting that Alaska did not offer a subsidy. It distinguished *Reeves* by noting that the Alaska regulation involved foreign commerce, a natural resource, and restrictions on resale of that resource. Finally, it distinguished *White* by suggesting that the limit of the market participation exception must at least be the "narrowly defined" market in which the state participates. Otherwise, the plurality stated, the "exception has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissable purpose of fostering local industry."

Justice White concluded that while Alaska may qualify as a participant in the timber market, the state's policy exerted a regulatory effect in the downstream timber-processing market in which it did not participate. *Id.* at 97-99 (White, J., plurality opinion). *South-Central Timber* defined such markets as: first, outside the immediate disposition of a product; and second, consisting of the separate economic activities of the local government's trading partners. *Id.* at 98-99. The Alaska regulation failed on both counts: in conditioning the initial sale on subsequent processing the policy, first, effectively affected a

transaction beyond the initial sale of a product, and, second, sought to govern the downstream activity of the purchaser.

There is no principled way to distinguish this case from *South-Central Timber*. Lycoming County does not participate in a market "for disposal services." Rather, like any other landfill, it sells space to concerns that have earlier transacted to purchase and process solid waste. No less than with Alaskan timber, conditions on the sale of Pennsylvanian space, at least when based on the origin of incoming solid waste, have a significant regulatory impact on markets in which the county does not participate. Like the Alaska prohibition, Lycoming County's price structure in reality attempts to restrict waste processors from purchasing waste from outside the county and state; transactions clearly beyond those involving the processors and the county itself. Also like the Alaskan policy, the county pricing scheme governs the "private economic relationships of its trading partners;" namely, the patterns of trade between concerns like Swin and its waste suppliers in New Jersey.

The only conceivable distinction between the two situations lies in the timing of the extra-market activity affected. With timber the impermissible restrictions hindered post-purchase activity; in the case of landfill space the burdened activity is retrospective. That the regulation here thus affects an "upstream" rather than "downstream" market in no way salvages the county's policy from Commerce Clause disfavor.

The Lycoming landfill does not qualify as a market participant even absent the limit of the *South-Central Timber* plurality. Unlike *Alexandria Scrap*, the county is not encouraging goods across its borders by means of a bounty, but is instead prohibiting the interstate flow of goods by means of a discriminatory charge. *See Alexandria Scrap*, 426 U.S. at 804-

06. Unlike *Reeves* and *White*, the county has not entered a highly competitive market dominated by private enterprise, such as concrete and construction, but has rather entered a hybrid area that involves a distinctive public need in a highly regulated environment. *See Hancock Industries v. Schaeffer*, 811 F.2d at 231-32 (3d Cir. 1987). In this regard, the operation of a municipal landfill is no more an entry into a local market than is the operation of a municipal school system.[2]

South-Central Timber is also significant in anticipating the Supreme Court's tacit rejection of the market participant theory in *Garcia*. The *Alexandria Scrap* line of cases rests upon substantially the same notoriously flawed analytic framework of the state-federal relationship made infamous in *National League of Cities*, the companion case to *Alexandria Scrap*. In *National League of Cities*, the Court held that the Commerce Clause did not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act against states in "areas of traditional government functions." 426 U.S. at 852. Eight years later, and subsequent to all four market participant cases, *Garcia* explicitly overruled the Com-

---

[2] The majority's glib response to this observation, typescript page 15 n.2, entirely misses the point. Local school district pupil placement escapes dormant commerce clause scrutiny not because school districts are market participants, but because offering instruction to pupils has not been traditionally regarded as commerce. Operating sanitary landfills *is* commerce. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). A Pennsylvania regulation prohibiting school districts from purchasing pencils, paper, or milk originating in New Jersey would effect commerce, and could escape dormant commerce clause scrutiny only by virtue of an exception. Such a regulation would not be adopted by any rational decisionmaker acting consistently with market motivations. It might well be adopted by a rational local politician who had a local contributor in the school supply or milk business. Apparently the majority would uphold such a regulation which demonstrates that its application is nothing more than an application of National League of Cities v. Usery, 426 U.S. 833, (1976) in drag. That is true as well, of course, of Alexandria Scrap Corp., 426 U.S. 794 (1976).

merce Clause analysis of *National League of Cities*.[3] ¡Since this now-rejected analysis also underlies *Alexandria Scrap, Reeves, White,* and even *South-Central Timber,* this Court should reject the market participant exception in light of *Garcia's* mandate.

Garcia overturned *National League of Cities* on two main grounds: first, that the concept of "traditional" governmental functions was unworkable; and second, that the true safeguard of state sovereignty lies not with judicially-imposed limits on the reach of the Commerce Clause in the interest of states rights but in the procedural political safeguards present in Federal government. The Court observed that the lower courts' numerous attempts to apply the *National League of Cities* standard of "traditional," "historic," "integral," or "non-proprietary," to actual government functions had proven wildly inconsistent. 469 U.S. at 538-39. Among the instances so noted is one case deeming solid waste disposal a traditional government activity. *Id.* at 538 (*citing Hybud Equipment Corp. v. City of Akron,* 654 F.2d 1187, 1196 (6th Cir. 1981). The Court therefore rejected any attempt at judicial determination of what was or was not a proper governmental function for Commerce Clause purposes. Viewing the consequence of *National League of Cities* in tandem with democratic theory, the Court declared:

> *We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judical appraisal of whether a particular governmental function is "integral"*

---

[3] ¡Since *Garcia*, only two cases have discussed the market participant doctrine to any degree; neither applied it. *See New Energy Co. of Indiana v. Limbach,* 486 U.S. 269 (1988); *Wisconsin Dept. of Energy, Labor and Human Relations v. Gould, Inc.,* 475 U.S. 282 (1986).

> *or "traditional."* Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from these principles. If there are to be any limits on the Federal Government's power to interfere with state functions ... we must look elsewhere.

Id. at 546-47 (emphasis added).

The *Garcia* court found these limits in the structure of the Federal government. The devices cited included state representation in the Senate, the electoral college, and separation of powers prevention of a single-minded attack on state sovereignty. From this survey the Court concluded that the fundamental limits on the scope of the Commerce Clause are not categorical but procedural, stating that "[a]ny substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than dictate a 'sacred province of state autonomy.'¡" *Id.* at 554 (citation omitted).

Rejection of the market participant theory necessarily follows from *Garcia* on each of that case's main premises. First, the regulatory/government distinction is nothing more than the integral/non-integral distinction in another guise. To be sure, the distinction played divergent roles depending upon whether Congress had acted. Under *National League of Cities*, the label of "integral" or "governmental" protected a state activity from the Commerce Clause; under *Alexandria Scrap*, the label "regulatory" or "governmental" left a state activity open to (dormant) Commerce Clause attack. The different uses of the categories, however, changes neither their similar-

ity nor their invalidity. *Garcia* noted at length the inherent unworkability of such labeling. Indeed, in other contexts, courts have concluded exactly what the cases cited by the majority deny, that the operation of a landfill is an integral, traditional governmental activity. *See Hybud Equipment Corp.*, 654 F.2d at 1196 (deeming landfill operation a traditional governmental activity); *Hancock*, 619 F.Supp. 322, 328 (E.D.Pa. 1985) (stating, without deciding, that counties "simply regulat[e] landfills), 811 F.2d 225, 231-32 (3d Cir. 1987) (holding county operation of landfill "state action" for antitrust purposes).

Likewise, *Garcia's* reliance on procedural over categorical safeguards necessarily follows with respect to the dormant Commerce Clause no less than in its legislative aspect. *Garcia* reflected this reliance by asking whether, absent facile categories, Congressional action under the Commerce Clause violated state sovereignty given the procedural safeguards the states enjoy under the Constitutional framework, 469 U.S. at 547-55. Here the inquiry logically becomes whether, again absent categories like "participant" and "regulator," a state activity burdens interstate commerce given the economic safeguards that parties engaging in interstate commerce enjoy in a national economy. States affected by a measure under the court's application of the dormant Commerce Clause are free to seek redress through the national political process;[4] only when Congressional action undermines that process may courts limit that action. Parties like Swin affected by a state's purported private commercial activity are left to respond through the national free market; only when the state's mea-

---

[4] E.g. Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (State taxation of foreign insurance companies does not violate commerce clause where congressional act authorizes tax.).

sure distorts usual market processes may the courts invalidate such a measure. In each instance the question turns on whether the challenged activity assaults a value protected by the Constitution despite protections inherent in the national framework.[5]

In light of *Garcia*, the Commerce Clause clearly prohibits the three-tier fee structure of Lycoming County. In the first instance, no facile analogy of the county to a private landfill operator, or labelling of its operation as "non-governmental" or "non-regulatory" automatically protects the county's activity. Instead, the proper inquiry is whether the county's actions distort market forces in such a way that private parties engaged in interstate commerce cannot realistically respond or compete. Here the answer must be yes. No number of efficiencies on Swin's part would overcome the $16.75 to $20.00 per ton differential that effectively bars New Jersey's solid waste from crossing the Delaware to Lycoming. Given the county's discriminatory rate structure, there is simply no way that private processors purchasing out-of-state waste could through the market compete against those who use Pennsylvania's waste exclusively for the use of the Lycoming landfill.

Viewed in this way, *Garcia*'s repudiation of the market participant doctrine reflects economic reality and common sense. The notion that state enterprises "participate" in the market on the same footing as private concerns is a chimera. Private market participants have limited resources and must ultimately seek a profit to survive. In contrast, government

---

[5] Logic might suggest that not only the states as states but private parties as well should address federalistic concerns to Congress. *See* J. Choper, Judicial Review and the National Political Process (1980). One reason against extending the matter this far is the comparatively greater power of the states in national politics than of any individual. In any event, the Court has thus far only addressed the problem of the unique role of states as states.

"market participants"invariably seek political goals in the place of economic ends. They do so because the ultimate option of raising compulsory revenue affords governments the luxury of ignoring bottom lines in a manner no private concern would dare.

The present appeal provides a typical case in point. However much their market might be regulated, private landfill operators still desire to turn a profit. Few, if any, would give a second thought to the origin of the waste filling the space sold. Nor is it likely that any would long stay in business even assuming some highly unusual public commitment to the preservation of that space by locals. Under any realistic view, the Lycoming landfill in private hands would never have hindered its ability to sell space to the highest bidder by erecting a differential rate structure that discriminated against waste the further its point of origin. If anything, it would have created a fee structure that did precisely the opposite. A vendor of landfill space hoping to attract business, as do genuine market participants, would logically attempt to lure large volume purchasers concerned with transportation costs through a discount, especially when it appeared that customers dealing in local waste could not themselves provide sufficient business. As an exercise toward the political end of saving space for county waste, Lycoming County's price structure makes good regulatory sense. As an essay in market participation, it is aberrant and the majority's application of the label "market participant" to Lycoming County is an economic jest.

The other market participation cases on which the majority rely are no less anomalous. No private real estate developer in a competitive market would last long given a self-imposed, political restriction of its work force to local residents assuming the availability of cheaper or more qualified labor residing

elsewhere. *See White,* 460 U.S. at 208. Nor in any realistic sense does a state-backed concrete producer that restricts the sale of its product on political grounds resemble a private business. *See Reeves,* 447 U.S. at 437-39. Nor, finally, would any private scrapper be likely to grant a bonus to wreckers carting hulks from within a state. *See Alexandria Scrap,* 426 U.S. at 804-06. The whole charade of the market participant exception totally unrelated to the regulatory effect of free markets operating with a profit motive, was never anything but a peculiar manifestation of the "new federalism" run amok; states rights in drag. *Garcia,* I believe, signals that the Supreme Court has turned its back on the political rhetoric of the "new federalism," and on its economically deformed market participant sibling.

II

It is not the task of this Court to overrule past Supreme Court decisions in light of later precedents. Instead, this Court must apply current Commerce Clause jurisprudence to the present appeal. That jurisprudence at the very least precludes application of the market participation doctrine to this case. Properly read, it further requires the rejection of that doctrine and the economic fantasies that underpin it. For all these reasons, I dissent from the application of the so called market participant exception to the Commerce Clause in this case.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-5500

SWIN RESOURCE SYSTEMS, INC.,

Appellant

v.

LYCOMING COUNTY, PENNSYLVANIA, acting through the Lycoming County Solid Waste Department; WILT, DOLLY M.; and SMITH, GENE; and MORNINGSTAR, LORA P., all in their respective official capacities as Commissioners of Lycoming County, Pennsylvania and in each of their individual capacities; and ALEXANDER, WAYNE I., in his official capacity as General Manager of Solid Waste Facilities of the Lycoming County Solid Waste Department and in his individual capacity,

Appellees

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civil No. 87-1565)

PRESENT: GIBBONS, *Chief Judge*, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges*, and WEIS, *Senior Circuit Judge*.*

---

*As to panel rehearing only.

The petition for rehearing filed by Appellant Swin Resource Systems, Inc. having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED. Chief Judge Gibbons and Judge Sloviter would grant rehearing.

BY THE COURT,

/s/Edward R. Becker

Circuit Judge

DATED: Sep. 25, 1989